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Supreme Court, U.S.
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No. 02-1026

In the

Supreme Court of the United States

MICHAEL L. MILLER,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether Petitioner failed to exhaust his administrative remedies on his claim of retaliation under the Americans with Disabilities Act, 42 U.S.C. § 12102 *et seq.*, when he failed to check the "retaliation" box on the charge he filed with the Equal Employment Opportunity Commission and he otherwise failed to disclose his claim of retaliation to the EEOC even though the alleged retaliation occurred before he filed his charge?

(2) Whether Petitioner is substantially limited in the major life activity of working and considered disabled, as defined by the Americans with Disabilities Act, because his physician temporarily restricted him from working more than 10 hours overtime per week?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Southwestern Bell Telephone Company was formerly a Missouri corporation. On December 30, 2001, Southwestern Bell Telephone Company became Southwestern Bell Telephone, L.P., a Texas Limited Partnership. Southwestern Bell Telephone, L.P. is a wholly-owned subsidiary of SBC Communications Inc., a publicly traded Delaware corporation. SBC Communications Inc. has no parent company.

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JURISDICTION

The court of appeals entered its judgment on October 7, 2002. The petition for writ of certiorari was filed on January 6, 2003 and docketed on January 8, 2003. This Honorable Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner is a former employee of Respondent Southwestern Bell Telephone Company ("Company"). On September 21, 1998, Petitioner turned in a time report to his manager charging the Company for 2 ¼ overtime hours for a job that he did not work. After an investigation, management determined that another technician was actually dispatched to and completed the repairs the Petitioner reported having completed. Because Petitioner falsified his time report, he was terminated effective November 10, 1998 for falsifying his time report, a violation of the Company's Code of Business Conduct.

On or about October 21, 1999, Petitioner filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging disability and age discrimination. On or about April 11, 2000, Petitioner's charge was amended to cure a technical defect so as to specifically reference the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, in the text portion of the charge. Neither the original nor the amended charge filed with the EEOC alleged or in any way referenced a claim of retaliation. The EEOC issued a "right-to-sue" letter and Petitioner eventually brought this suit in federal district court on June 5, 2000.

B. Proceedings Below.

On October 22, 2001, the district court granted Respondent's motion for summary judgment on all of Petitioner's claims finding that Petitioner failed to establish a prima facie case of discrimination and/or retaliation under the ADA, that Respondent had a legitimate, non-discriminatory reason for dismissing Petitioner, and that Petitioner failed to offer evidence sufficient to find that Respondent's stated reasons were pretextual for discrimination or retaliation. The opinion of the district court was not published but has been attached to the Petition for Writ of Certiorari as Appendix "D". *See* Pet. App. 23a-44a.

On October 7, 2002, the Fifth Circuit issued its opinion affirming the district court's judgment granting Respondent's motion for summary judgment. The Fifth Circuit concluded that Petitioner was not disabled, as defined by the ADA, and that he had failed to exhaust his administrative remedies concerning his claim for retaliation under the ADA. The opinion of the court of appeals was not published but has been attached to the Petition for Writ of Certiorari as Appendix "A". *See id.* at 1a-18a.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 states that review on a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. Therefore, a petition for a writ of certiorari will be granted only for compelling reasons. *Id.* In the present case, there is absolutely no reason, let alone a compelling one, for this Honorable Court to grant the petition. The petition does not seek the resolution of a legal issue of national importance, and there is no conflict among the circuits warranting this Court's intervention.

As a basis for requesting review, Petitioner criticizes the Fifth Circuit's ruling that he failed to exhaust his administrative remedies when he failed to allege retaliation in his EEOC charge or otherwise notify the EEOC that he was complaining of unlawful retaliation. Petitioner claims that the Fifth Circuit ruled on such an important question of federal law that this Court is compelled to grant the petition. While this Court has not considered the very narrow question presented, this case presents no compelling or important issues of federal law requiring this Court's review.

To support his request for review, Petitioner claims that the Fifth Circuit misinterpreted and misapplied a decision of the Seventh Circuit. This assertion is not meritorious. The Fifth Circuit below properly concluded that Petitioner failed to exhaust his administrative remedies on his claim of retaliation because Petitioner failed to allege retaliation in his EEOC charge or otherwise notify the EEOC that he was complaining of unlawful retaliation even though the complained of retaliation occurred before Petitioner filed his EEOC charge. The other courts of appeals to have considered this issue have ruled uniformly with the Fifth Circuit. Consequently, there is no conflict in the circuits warranting this Court's intervention.

Moreover, the district court found that, regardless of whether Petitioner exhausted his administrative remedies, Respondent nevertheless was entitled to summary judgment on the merits of the retaliation claim. Consequently, even if the Fifth Circuit were in error, the error is harmless.

As an additional basis for requesting review, Petitioner challenges the Fifth Circuit's ruling that the Petitioner's temporary inability to work in excess of 10 hours of overtime per week was not a substantial limitation on his ability to work. Petitioner contends that this Court should grant the petition because this Court has not ruled on

the issue of whether an employee's inability to work 10 hours of weekly overtime constitutes a disability under the terms of the ADA. Again, this issue is so narrow and so fact-specific that it does not present a legal question of national importance warranting this Court's review. The Fifth Circuit properly concluded, again consistent with the rulings of several sister courts of appeals, that Petitioner's inability to work overtime was not a substantial limitation on his ability to work. In the present case, the Petitioner could and did work for the Respondent as a full-time employee, notwithstanding any overtime restrictions.

Furthermore, even if Petitioner was temporarily unable to work mandatory overtime in his specific job, pursuant to this Court's recent decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), Petitioner failed to establish a prima facie case (*i.e.* that he was disabled from working) because he did not plead or prove that he was incapable of performing a broad range of jobs. Consequently, even if the Fifth Circuit were in error on the issue of overtime restrictions, the error is harmless because Petitioner was not disabled from working.

Because the Fifth Circuit's ruling is proper in all respects and Petitioner has not presented any important issue of federal law that compels this Court's review, Respondent respectfully urges this Honorable Court to deny the petition.

ARGUMENT AND AUTHORITIES

A. There is no compelling reason for this Court to grant the petition because it is well settled that an employee seeking redress for a claim of unlawful retaliation must first exhaust his administrative remedies with the EEOC when the alleged retaliation occurs before the EEOC charge is filed.

In a veiled attempt to garner this Court's attention, Petitioner argues that this Court is compelled to rule on the narrow question presented since the Court has not yet addressed the specific issue. Petitioner further suggests that the Fifth Circuit's ruling is in conflict with the ruling of a sister circuit. There is no compelling reason to grant the petition because there is no conflict in the courts of appeals and the narrow question presented does not warrant this Court's review.

1. The narrow question presented does not warrant this Court's review and the courts of appeals have ruled uniformly.

In the present case, the Petitioner alleged claims of intentional disability discrimination and retaliation under the ADA. This Court has previously observed that there are certain jurisdictional prerequisites that an employee must satisfy before he is entitled to institute a discrimination lawsuit (*i.e.* timely filing a charge of employment discrimination with the EEOC). *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (involving Title VII of the Civil Rights Act of 1964); *see also* AMERICANS WITH DISABILITIES ACT, 42 U.S.C. § 12117(a) (1994)(incorporating Title VII procedural requirements into ADA). The purpose of requiring an employee to exhaust his administrative remedies is to preserve judicial

economy by barring claims that have not been sufficiently investigated following an EEOC complaint. See *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992).

Following this authority, the Fifth Circuit has specifically held that an employee may not bring an ADA claim in a lawsuit when that claim was not included in the employee's EEOC charge. *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996). Consequently, to pursue a claim for "retaliation" under the ADA, an employee must first exhaust his administrative remedies by filing a charge with the EEOC alleging unlawful retaliation. *See Cable v. Ivy Tech State College*, 200 F.3d 467, 477-78 (7th Cir. 1999); *Morton v. GTE North, Inc.*, 922 F. Supp. 1169, 1177 (N.D. Tex. 1996), *aff'd*, 114 F.3d 1182 (5th Cir.), *cert. denied*, 522 U.S. 880 (1997); *McCray v. DPC Industries, Inc.*, 942 F. Supp. 288, 295 (E.D. Tex. 1996).

In the present case, the Fifth Circuit properly concluded that Petitioner failed to exhaust his administrative remedies on his claim of retaliation when he failed to make any reference to a claim of retaliation in the charge that he filed with the EEOC. See Pet. App. at 18a. First, the court observed that in his EEOC charge, Petitioner neither marked the "retaliation" box nor indicated in the narrative of his charge that he was seeking redress from the EEOC for unlawful retaliation. *Id.* at 16a. The court further noted the absence of "other supplemental EEOC materials" evidencing that Petitioner complained about unlawful retaliation when he filed his charge with the EEOC. *Id.* At this point in its analysis, the court found significant the complete absence of any reference to a claim of retaliation during the administrative process before the EEOC. See *id.*

Next, the Fifth Circuit addressed the issue of whether an employee complaining of retaliation was

required to file a charge with the EEOC alleging retaliation. In its analysis, the court distinguished between circumstances in which the alleged retaliation occurs before the employee files a charge with the EEOC and those instances where the alleged retaliation occurs after the employee filed the EEOC charge. *See id.* at 17a. In *Gupta v. East Texas State University*, 654 F.2d 411, 414 (5th Cir. 1981), the Fifth Circuit ruled that when retaliation occurs *after* an EEOC charge is filed, an employee is not required to file a second charge alleging retaliation in order to exhaust his administrative remedies. However, when the alleged retaliation occurs *before* the initial EEOC charge is filed, an employee must exhaust his administrative remedies on that claim by filing an EEOC charge because to hold otherwise would effectively exempt all retaliation claims from the requirement that the employee first exhaust his administrative remedies through the EEOC. *See McCray*, 942 F. Supp. at 295 (summary judgment granted on employee's retaliation claim where alleged retaliation occurred before EEOC charge was filed and employee failed to check "retaliation" box on the charge); *Perez v. MCI World Com Communs.*, 154 F. Supp.2d 932 (N.D. Tex. 2001) (summary judgment granted on retaliation claim because employee did not check "retaliation" box or include any statements in EEOC charge regarding retaliation even though alleged retaliation had already occurred); *Price v. Harrah's Maryland Heights Operating Co.*, 117 F. Supp. 2d 919, 921-22 (E.D. Mo. 2000) (granting summary judgment for employer due to failure of employee to exhaust her administrative remedies by not checking "retaliation" box and by not specifically alleging retaliation in text of EEOC charge).

Like the Fifth Circuit below, several other courts of appeals to have considered this very issue have uniformly required that an employee exhaust his administrative

remedies by making allegations of retaliation to the EEOC when the alleged retaliation occurs *prior to* the date that the EEOC charge is filed. *See Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 688-89 (8th Cir. 1998)(affirming summary judgment for employer because employee did not allege retaliation in original charge filed with EEOC even though alleged retaliation occurred before charge was filed), *cert. denied*, 526 U.S. 1004 (1999); *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799-800 (10th Cir.) (affirming summary judgment for employer where employee failed to allege retaliation in EEOC charge even though alleged retaliatory act occurred before charge was filed), *cert. denied*, 522 U.S. 935 (1997); *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 546-47 (6th Cir. 1991) (affirming summary judgment for employer where employee failed to mark the retaliation box on EEOC charge or otherwise refer to a claim of retaliation in statement to EEOC even though alleged retaliation occurred before employee filed the charge with EEOC); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544-45 (7th Cir. 1988) (affirming summary judgment for employer where employee failed to mark retaliation box on EEOC charge or otherwise refer to a claim of retaliation in statement to EEOC even though alleged retaliation occurred before employee filed the charge), *cert. denied*, 491 U.S. 907 (1989).

In the present case, the alleged "protected activity" occurred in September 1998 when Petitioner allegedly exercised his rights under the ADA and requested an accommodation to restrict his overtime hours. Significantly, Petitioner admitted in his deposition that Respondent fully accommodated Petitioner's request to limit his overtime hours. Moreover, Petitioner's original EEOC charge was not filed until October 21, 1999, more than one year after the alleged protected activity. Consequently, if Respondent retaliated against Petitioner

for exercising his rights under the ADA, the alleged retaliation occurred before he filed his EEOC charge. Petitioner failed to both check the retaliation box and to make any allegations concerning retaliation in his charge of discrimination filed with the EEOC. Because Petitioner failed to exhaust his administrative remedies on his claim of retaliation under the ADA, the Fifth Circuit properly concluded that Respondent was entitled to summary judgment as a matter of law.

2. The Fifth Circuit's decision does not conflict with the Seventh Circuit's decision in *Cable v. Ivy Tech State College.*

In its opinion, the Fifth Circuit cited to an decision by the Seventh Circuit, *Cable v. Ivy Tech State College*, 200 F.3d 467 (7th Cir. 1999), for the proposition that an employee's failure to fill in the appropriate box in the EEOC charge alleging retaliation, coupled with the inability to describe the general nature of the disputed claim in the narrative section of the charge, forms a sufficient basis for summary judgment because of the employee's failure to exhaust his administrative remedies. See Pet. App. at 15a.

In *Cable*, the plaintiff, like Petitioner here, alleged disability discrimination and retaliation under the ADA. The Seventh Circuit found that the plaintiff failed to sufficiently describe the retaliation claim in the EEOC charge. *Cable*, 200 F.3d at 477. However, the court looked to the appellate record for additional charge information the employee provided to the EEOC to determine if the employee raised the issue of retaliation. See *id.* at 477-78. Ultimately, the court concluded that the additional affidavit and charge information that the employee provided to the EEOC was sufficient to find that the

employee exhausted her administrative remedies. *See id.* at 478.

Contrary to Petitioner's claim, there is absolutely no conflict between the Fifth Circuit's decision below and the Seventh Circuit's decision in *Cable*. Like the plaintiff in *Cable*, Petitioner failed to make any allegations of retaliation in the charge document filed with the EEOC. Unlike *Cable*, however, in the present case there is no evidence in the trial or appellate record of any additional affidavits or charge information that Petitioner filed with the EEOC that would have put the EEOC or Respondent on notice that, in addition to claiming disability discrimination, Petitioner was also asserting a claim of retaliation.[1]

In conclusion, the Fifth Circuit's ruling that the Petitioner failed to exhaust his administrative remedies on his claim of retaliation does not present such a compelling or important issue of federal law that this Court should grant the petition. Consequently, the Respondent urges the Court to deny the petition.

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[1] In his petition, Petitioner references a charge information form wherein he allegedly put the EEOC and Respondent on notice that he was complaining of retaliation for having requested an accommodation regarding overtime. Fundamentally, this charge information form is not a part of the appellate or trial record. Moreover, the form does not allege facts supporting a claim of retaliation.

B. There is no compelling reason for this Court to grant the petition to determine the narrow issue of whether the temporary limitation on Petitioner's ability to work in excess of 10 hours of overtime per week was a substantial limitation on his ability to work thus rendering him disabled under the ADA.

The second question presented by Petitioner is so narrow and fact-specific that there is no compelling reason for this Court to grant the petition. Petitioner has asked this Court to decide whether his doctor-imposed limit of a maximum of 10 hours of overtime per week constituted a substantial impairment of Petitioner's ability to work such that he was "disabled" under the ADA. In its decision below, the Fifth Circuit cited to a decision of the Sixth Circuit for the proposition that the inability to work overtime is not a substantial limitation on the ability to work under the ADA. *See* Pet. App. at 11a.

In *Cotter v. Ajilon Services, Inc.*, 287 F.3d 593, 598-99 (6th Cir. 2002), the Sixth Circuit found that an employee's inability to work overtime does not constitute a substantial limitation on the employee's ability to work, as defined by the ADA. Like the Fifth and Sixth Circuits, other courts considering this very issue have uniformly concluded that an employee's inability to work overtime does not constitute a substantial limitation on the employee's ability to work. *See Kellogg v. Union Pac. R.R.*, 233 F.3d 1083, 1087 (8th Cir. 2000); *Tardie v. Rehabilitation Hospital of Rhode Island*, 168 F.3d 538, 542-43 (1st Cir. 1999); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999); *Doebele v. Sprint Corp.*, 157 F. Supp. 2d 1191, 1211 (D. Kan. 2001); *Muthler v. Ann Arbor Machine, Inc.*, 18 F. Supp. 2d 722, 728-29 (E.D. Mich. 1998); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 808 (N.D. Ind.

1996). Anyone who can work 50 hours per week is not suffering a substantial limitation on a major life activity, namely, the ability to work. *See Brennan v. National Telephone Directory Corp.*, 850 F. Supp. 331, 343 (E.D. Pa. 1994). Quite simply, the inability to work overtime hardly makes a person disabled. *See id.*; *see also Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 599 (6th Cir. 1999) (affirming summary judgment for employer because even though the employee was unable to work overtime, the employee was not disabled; whether an employee is disabled does not turn on workable hours).

Petitioner erroneously contends that because a service emergency had been declared and other employees were being required to work 44 hours of overtime per week during the service emergency, he was substantially limited in his ability to work because he was authorized by his physician to only work a maximum of 10 hours of overtime per week. Petitioner's argument is without merit. *See Tardie v. Rehabilitation Hospital of Rhode Island*, 6 F. Supp. 2d 125, 130 (D.R.I. 1998), *aff'd*, 168 F.3d 538 (1st Cir. 1999) (employee's inability to work more than 40 hours per week did not render her disabled even though her job *required* her to work in excess of 50 hours per week). In the present case, Petitioner could and did work as a full-time employee, notwithstanding his overtime restrictions. The service emergency was only temporary, as were Petitioner's overtime restrictions.

Moreover, even assuming that Petitioner was unable to work in excess of 10 hours of overtime per week, his inability to perform one aspect of his job (*i.e.* greater than 10 hours of overtime per week) while retaining the ability to perform the work in general does not amount to a substantial limitation on his ability to work. *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726-27 (5th Cir. 1995).

In *Sutton v. United Air Lines*, this Court held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." 527 U.S. at 491. According to this Court, "[t]o be substantially limited in the major life activity of working, . . . one must be precluded from more than one type of job, a specialized job, or a particular choice of job." *Id.* at 492. Likewise, in *Toyota Motor Manufacturing v. Williams*, this Court emphasized that "the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with his specific job." 534 U.S. at 201. Although Petitioner may have been temporarily restricted from working in excess of 10 hours of overtime per week in his specific job, there was no evidence that he could not perform any other of a broad range of jobs because of this temporary overtime restriction.

In conclusion, the Fifth Circuit's ruling that Petitioner's inability to work more than 50 hours in a workweek did not make him disabled under the ADA is correct. Moreover, the Fifth Circuit's narrow and fact-specific ruling does not present such an important issue of federal law that this Court is compelled to grant discretionary review. Indeed, because the question presented can be answered by this Court's decisions in *Sutton* and *Toyota Motor Manufacturing* this Court should deny the petition.

C. The Court should not consider petitioner's claim of error on the merits of his disability or retaliation claims.

Petitioner devotes several pages of his petition to quarreling about the district court's rulings on the merits

of his claims for disability discrimination and retaliation. While it is tempting to engage in a debate of the merits of those claims, suffice it to say that the evidence in the record supports the lower courts' findings that Petitioner's claims for disability discrimination and retaliation fail as a matter of law. Consequently, even if this Court were to grant the petition on the narrow questions presented, the record supports Respondent's entitlement to summary judgment.

IV.
CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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